No. 17-949

IN THE

# Supreme Court of the United States

JOHN STURGEON,

*Petitioner,*

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## Brief of National Parks Conservation Association, Defenders of Wildlife, The Wilderness Society, American Rivers, Center for Biological Diversity, Sierra Club, Wilderness Watch, Denali Citizens Council, Copper Country Alliance, Alaska Quiet Rights Coalition, Northern Alaska Environmental Center, Friends of Alaska National Wildlife Refuges, Alaska Wilderness League, in Support of Respondents


THOMAS E. MEACHAM
ATTORNEY AT LAW
9500 Prospect Drive
Anchorage, AK 95507

DONALD B. AYER
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001

VALERIE BROWN
*Counsel of Record*
KATHERINE STRONG
TRUSTEES FOR ALASKA
1026 W. 4th Avenue, Suite 201
Anchorage, AK 99501
(907) 433-2014
vbrown@trustees.org

*Counsel for Amici*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

INTERESTS OF AMICI CURIAE ..... 1

SUMMARY OF THE ARGUMENT ..... 3

ARGUMENT ..... 6

I. The Challenged Regulation Is Proper Under the Long-Standing Authority of the National Park Service to Regulate Navigable Waters Within Park Boundaries ..... 6

II. ANILCA Preserves the National Park Service's Authority to Regulate Navigable Waters Overlying State-Owned Submerged Land ..... 9

III. The National Park Service Must Have The Power to Regulate The Navigable Waters To Achieve The Purposes For Which Congress Established The Parks ..... 18

CONCLUSION ..... 22

MAP OF YUKON-CHARLEY RIVERS NATIONAL PRESERVE ..... A-1

## TABLE OF AUTHORITIES

### Cases

*Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000) ..... 1

*Arizona v. California*, 373 U.S. 546 (1963) ..... 7

*Cappaert v. United States*, 426 U.S. 128 (1976) ... 5, 17

*Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480 (1947) ..... 10, 18

*Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977) ..... 7

*First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n*, 328 U.S. 152 (1946) ..... 7

*John v. United States*, 720 F.3d 1214 (9th Cir. 2013) ..... 17

*Kleppe v. New Mexico*, 426 U.S. 529 (1976) ..... 6

*Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) ..... 7

*Minnesota ex rel. Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981) ..... 9

*PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012) ..... 15

*Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ..... 7

*Sturgeon v. Masica*, 768 F.3d 1066 (9th Cir. 2014) .. 15

*United States v. Alford*, 274 U.S. 264 (1927) ..... 6

*United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).....7

*United States v. Armstrong*, 186 F.3d 1055 (8th Cir. 1999).....8

*United States v. Brown*, 552 F.2d 817 (8th Cir. 1977) .....8

*United States v. California*, 436 U.S. 32 (1978).....18

*United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913).....18

*United States v. Hells Canyon Guide Serv., Inc.*, 660 F.2d 735 (9th Cir. 1981) .....9

*United States v. Moore*, 640 F. Supp. 164 (S.D. W. Va. 1986) .....9

*United States v. Oregon*, 295 U.S. 1 (1935) .....15

*United States v. Raddatz*, 447 U.S. 667 (1980)..10, 16

*United States v. Rands*, 389 U.S. 121 (1967) .....6, 17

*Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973).....18

**Constitutional Provisions**

U.S. CONST. art. I, § 8, cl. 2 (Commerce Clause).....6

U.S. Const. art. IV, § 3, cl. 2 (Property Clause) .....6

**Statutes**

16 U.S.C. § 1274(a)(25)–(50) ..... 15
16 U.S.C. § 1281(a) ..... 15
16 U.S.C. § 1281(e) ..... 15
16 U.S.C. § 1284(a) ..... 16
16 U.S.C. § 1284(d) ..... 15
16 U.S.C. § 1a-2(h) ..... 9
16 U.S.C. § 3101(b) ..... 4, 11
16 U.S.C. § 3102(1)–(3) ..... 17
16 U.S.C. § 3103(c) ..... passim
16 U.S.C. § 3121(b) ..... 11
16 U.S.C. § 3170(a) ..... 4, 10, 11, 16
16 U.S.C. § 3202(b) ..... 4, 10
16 U.S.C § 3207 ..... 4, 10, 16
16 U.S.C. § 410hh ..... 13
16 U.S.C. § 410hh(1) ..... 12–13
16 U.S.C. § 410hh(2) ..... 4, 13
16 U.S.C. § 410hh(3) ..... 13
16 U.S.C. § 410hh(4) ..... 13
16 U.S.C. § 410hh(6) ..... 12–13
16 U.S.C. § 410hh(7) ..... 13
16 U.S.C. § 410hh(8) ..... 12–13

16 U.S.C. § 410hh(9) ..... 13

16 U.S.C. § 410hh(10) ..... 11–14

16 U.S.C. § 410hh-1 ..... 13

16 U.S.C. § 410hh-1(1) ..... 12

16 U.S.C. §§ 5701–5727 ..... 21

43 U.S.C. § 1311(a) ..... 7

43 U.S.C. § 1311(d) ..... 8, 16

43 U.S.C. § 1314(a) ..... 8

54 U.S.C. § 100101(a) ..... 8

54 U.S.C. § 100751 ..... 2, 9

54 U.S.C. § 100751(a) ..... 9

54 U.S.C. § 100751(b) ..... 4, 8, 16

Northwest Ordinance of 1787, 1 Stat. 50 (1789) ..... 7

**Regulations**

36 C.F.R. § 13.1108 ..... 20

36 C.F.R. § 13.1108(a) ..... 20

36 C.F.R. § 13.1108(b)–(e) ..... 20

36 C.F.R. § 2.17(e) ..... 19

36 C.F.R. § 3.15(a) ..... 19

**Other Authorities**

General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30252 (June 30, 1983) ..... 9, 19

H.R. REP. NO. 94-1569, *reprinted in* 1976 U.S.C.C.A.N. 4290 ..... 8

H.R. REP. NO. 96-97, Part 1 (Apr. 18, 1979) ..... 14

*Hovercraft Environment*, HOVERCRAFT.ORG, www.hovercraft.org/hovercraft-environment/ (last visited Dec. 21, 2015) ..... 19

NAT'L PARK SERV., WINTER PATROLS IN YUKON-CHARLEY RIVERS, http://www.nps.gov/yuch/learn/news/upload/YUCH WinterPatrols2-fixed.pdf ..... 21

Robin Bravender, *National Parks: Moose Hunter's Unlikely Path to the Supreme Court*, GREENWIRE, Nov. 23, 2015, www.eenews.net/stories/1060028460/ (last visited Dec. 21, 2015) ..... 19

S. REP. No. 96-413 (1979) ..... 10, 12, 13, 14

*Yukon River*, YUKON INFO, www.yukoninfo.com/yukon-river/ (last visited Dec. 19, 2015) ..... 14

*Yukon-Charley Rivers: Plan Your Visit*, NAT'L PARK SERV., http://www.nps.gov/yuch/planyourvisit/index.htm (last visited Dec. 21, 2015) ..... 14, 20

*Yukon-Charley Rivers: What is Yukon Charley Rivers*, NAT'L PARK SERV., http://www.nps.gov/yuch/what-is-yukon-charley-rivers.htm (last visited Dec. 20, 2015) ..... 13

## INTRODUCTION[1]

At issue in this case is the authority of the National Park Service (Park Service) to regulate navigation on navigable waters within the Yukon-Charley Rivers National Preserve, a unit of the National Park System in eastern Alaska on the border of Canada. *See* Map at A1. The Yukon River extends nearly 2,400 miles from British Columbia and the Yukon Territory in Canada across the entire State of Alaska, to empty into the Bering Sea. *Ibid.* The Nation River, where petitioner seeks to use his hovercraft, is a tributary of the Yukon River that is navigable all the way to the Canadian border. *Alaska v. United States*, 201 F.3d 1154, 1158, 1164 (9th Cir. 2000). Congress, through the NPS Organic Act and the Alaska National Interest Lands Conservation Act (ANILCA), delegated authority over boating within the National Park system to the National Park Service. Section 103(c) of ANILCA, 16 U.S.C. 3103(c), did not withdraw this authority.

## INTERESTS OF AMICI CURIAE

*Amici curiae* are a diverse group of nonprofit organizations that have a substantial interest in ensuring that Alaska's Conservation System Units (CSUs) established by Congress in the Alaska National Interest Lands Conservation Act (ANILCA) are preserved and managed as mandated by Congress. Amici agree with the government that the 1976

---

[1] The parties in this case have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

amendment to the National Park Service Organic Act granted the National Park Service the authority to regulate boating and other activities "on . . . waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." 54 U.S.C. § 100751 (Pub. L. No. 94-458, 90 Stat. 1939 (Oct. 7, 1976), amending the Act of August 25, 1916, Publ. L. No. 64-235, 39 Stat. 535). Congress expressly incorporated this NPS authority over navigable waters in ANILCA. 16 U.S.C. § 410hh-2. The authority was not withdrawn or preempted by Section 103(c) of ANILCA. 16 U.S.C. § 3103(c).

*Amici* include national, regional, and local nonprofit organizations:

- The National Parks Conservation Association works to protect the National Park System;
- American Rivers seeks to protect wild rivers and restore damaged rivers;
- The Wilderness Society works to protect wilderness and America's public lands;
- Defenders of Wildlife works to protect wildlife and wildlife habitat;
- The Center for Biological Diversity seeks to protect all species from extinction;
- The Sierra Club seeks to encourage Americans to explore, enjoy, and protect the planet;
- Wilderness Watch works to defend and keep wild the nation's National Wilderness Preservation System;
- The Alaska Wilderness League seeks to preserve wild lands and waters in Alaska;

- The Alaska Quiet Rights Coalition seeks to protect and maintain natural quiet within Alaska's public lands;
- The Friends of Alaska National Wildlife Refuges works to promote the conservation of all Alaska National Wildlife Refuges;
- The Denali Citizens Council works to promote the natural integrity of Denali National Park and Preserve;
- The Copper Country Alliance seeks to protect the Copper River Basin, including the Wrangell-St. Elias National Park and Preserve; and
- The Northern Alaska Environmental Center works to protect habitats in Interior and Arctic Alaska.

*Amici* file this brief in support of the Park Service, to highlight for the Court the importance of the Park Service's jurisdiction over navigable waters to the continued protection of Alaska's National Parks[2] and other Conservation System Units created by ANILCA. *Amici* and their members have a long history of using and enjoying these places for the values Congress sought to protect when establishing these areas, and have a strong interest in their protection.

## SUMMARY OF THE ARGUMENT

The issue in this case is whether ANILCA repealed the Park Service's long-standing authority to regulate navigable waters within park boundaries. It did not.

---

[2] Throughout the brief, either "national parks" or "parks" is used to refer to National Park System Units, including National Preserves, which are all managed by the Park Service.

The power of the Park Service to regulate navigable waters in parks rests on the Constitution and on statutes that delegate that authority. Congress has long directed the Park Service to regulate "boating and other activities on or relating to water located within System units." 54 U.S.C. § 100751(b).[3] ANILCA itself specifically preserves pre-existing federal authority over rivers and the public lands. 16 U.S.C. §§ 3202(b), 3207. Indeed, ANILCA explicitly requires that the use of motorboats "shall be subject to reasonable regulations by the Secretary [of the Interior] to protect the natural and other values of the conservation system unit . . . ." 16 U.S.C. § 3170(a). In its very first section, ANILCA makes protection of those "natural and other values" its core purpose, *ibid*, and defines those values in great detail to include, among other things, protection of "rivers . . . to preserve wilderness resource values and related recreational opportunities . . . on freeflowing rivers." *Id.* § 3101(b).

Congress expressly incorporated the Organic Act's delegation of authority over boating in ANILCA. 16 U.S.C. § 410hh-2 (The Secretary "shall administer the lands, waters and interests therein . . . as new areas of the National Park System under the Organic Act.").

Reading § 103(c) of ANILCA, 16 U.S.C. § 3103(c), to undo by implication what the rest of ANILCA expressly put into place—and kept in place—violates basic tenets of statutory construction. This case is not about Park Service regulation of private or state-owned inholdings, or the limits placed on Park Service authority over those inholdings by § 103(c) of

---

[3] Pub. L. No. 94-458, 90 Stat. 1939 (Oct. 7, 1976), amending Act of August 25, 1916, Pub. L. No. 64-235, 39 Stat. 535 ("NPS Organic Act").

ANILCA. Development will not come to a halt on the 19 million acres of non-federal land within CSUs if the regulation challenged by petitioner is upheld. Park Service restrictions on hovercraft put at issue only the agency's authority to regulate activities on navigable waters overlying state-owned submerged land within park boundaries.

Section 103(c) does not address the federal power to regulate navigable waters, a power that does not depend on ownership of the submerged land. Indeed, both the Submerged Lands Act (SLA) and ANILCA expressly reserve the federal power over navigation. Further, even if the federal power to regulate navigable waters depended on the existence of a federal property interest of some sort—and it does not—such an interest clearly exists in the federal reserved water rights the United States has retained in the waters involved in this case. *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

The authority of the Park Service over navigable waters within the parks is critical to the parks fulfilling the purposes for which they were established. The Park Service regulates activities on navigable waters to accomplish those purposes. Consideration of actual instances of regulation within specific CSUs demonstrates why that authority is essential. If the Park Service did not have regulatory authority over navigable waters within the parks, ANILCA's mandate to protect these areas would be impossible to fulfill.

## ARGUMENT

### I. THE CHALLENGED REGULATION IS PROPER UNDER THE LONG-STANDING AUTHORITY OF THE NATIONAL PARK SERVICE TO REGULATE NAVIGABLE WATERS WITHIN PARK BOUNDARIES

Congress has the power to regulate navigable waters within the National Park System and other federal lands pursuant to the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, and the Commerce Clause, U.S. CONST. art. I, § 8, cl. 2. This authority does not depend on federal ownership of the submerged land.

Under the Property Clause, Congress has "the power to determine what are 'needful' rules 'respecting' the public lands." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). This power is entrusted to Congress "without limitations" and "is broad enough to reach beyond territorial limits." *Id.* at 538–39; *see also United States v. Alford*, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."). This necessarily includes the regulation of activities within park boundaries that could interfere with a park's purposes.

The Commerce Clause confers on Congress the power to regulate commerce, which this Court has found includes control of "all the navigable waters of the United States. . . . For this purpose they are the public property of the nation . . . ." *United States v. Rands*, 389 U.S. 121, 122–23 (1967). This power is unaffected by State or private ownership of the submerged land, *id.* at 123, and is "as broad as the needs of commerce," extending beyond the regulation

of navigation itself. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940).

The profound national interest in navigable waters was recognized as early as the Northwest Ordinance of 1787, which provided that "the navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free." Northwest Ordinance of 1787, 1 Stat. 50, 52 (1789) (reenactment of Ordinance by first Congress). Since then, this Court has regularly upheld federal actions on navigable waters, notwithstanding state ownership of the submerged land. Examples include the licensing of dams, *First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n*, 328 U.S. 152 (1946); the regulation of fishing, *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); the recognition of Indian fishing rights, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); and the reservation of waters for Indian tribes, national recreation areas, and national wildlife refuges, *Arizona v. California*, 373 U.S. 546, 597–601 (1963). Management of navigable waters—irrespective of state ownership of the submerged land—is one of the oldest, most traditional, and most well-established of all federal powers. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (referring to Congress' "traditional jurisdiction" over navigable waters).

The national interest in navigation is also reflected in the Submerged Lands Act (SLA), enacted in 1953. The SLA confirmed the transfer of the river bottoms to the states but it did not pass title to the waters themselves. 43 U.S.C. § 1311(a). It explicitly provided that "nothing" in the statute "shall affect . . . any rights of the United States . . . under the

constitutional authority . . . to regulate . . . navigation." *Id.* § 1311(d); *see also id.* § 1314(a). The federal government's power to regulate navigation was unaffected by the transfer of the submerged lands to the states. This fact is fatal to petitioner's case.

The federal government's authority over navigable waters was also preserved by the Park Service's Organic Act. Congress delegated to the Park Service the authority to manage the parks "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a). Congress directed the Park Service to promulgate regulations "concerning boating and other activities on or relating to water located within System units." 54 U.S.C. § 100751(b). The legislative history makes clear that, through this provision, Congress sought to give the Park Service the authority to regulate activities "on *any waters* within the system." H.R. REP. NO. 94-1569, at 6 (1976) (emphasis added), *reprinted in* 1976 U.S.C.C.A.N. 4290, 4292.[4]

---

[4] Outside the context of Alaska and ANILCA, the general power of the Park Service and other federal land management agencies to regulate activities on navigable waters within federally-owned public lands has been repeatedly upheld, notwithstanding state ownership of the underlying submerged land. *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977) (upholding a regulation that prohibited hunting on waters within park boundaries, even where the state owns the submerged land); *United States v. Armstrong*, 186 F.3d 1055 (8th Cir. 1999) (recognizing that Congress had authority under both the Property and Commerce

The regulation banning hovercraft within all National Parks was promulgated under this explicit statutory authority and under the Park Service's general authority to make regulations "necessary or proper for the use and management" of the National Park System. 54 U.S.C. § 100751(a); *see also* General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30252 (June 30, 1983) (issuing regulations pursuant to 54 U.S.C. § 100751 (formerly 16 U.S.C. §§ 1a–2(h), 3)).

## II. ANILCA PRESERVES THE NATIONAL PARK SERVICE'S AUTHORITY TO REGULATE NAVIGABLE WATERS OVERLYING STATE-OWNED SUBMERGED LAND

ANILCA preserves the Park Service's statutory authority under 54 U.S.C. § 100751 to regulate navigable waters within national parks in Alaska. ANILCA includes numerous provisions that indicate Congress intended the Park Service to regulate navigable waters within CSUs regardless of ownership of the submerged land. And it lacks any

---

Clauses to enact the statutory provision that directs the Park Service to regulate tour boat operators within Voyageurs National Park); *Minnesota ex rel. Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981) (upholding federal restrictions on the use of motorboats over state-owned submerged land in the Boundary Waters Canoe Area Wilderness of the Superior National Forest); *United States v. Hells Canyon Guide Serv., Inc.*, 660 F.2d 735 (9th Cir. 1981) (U.S. Forest Service has regulatory authority over navigable waters overlying state-owned submerged land in Hells Canyon National Recreation Area); *United States v. Moore*, 640 F. Supp. 164 (S.D. W. Va. 1986) (enjoining West Virginia from spraying pesticides within the boundaries of the New River Gorge National River without a Park Service permit, despite the State's ownership of the submerged land).

indication—in § 103(c) or anywhere else—that Congress intended to restrict the power of the United States with respect to the regulation of water resources. Congress would not have directed the Park Service to regulate activities on navigable waters, or established CSUs expressly to protect rivers, while at the same time revoking the agencies' authority to do so. The Court "cannot impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *United States v. Raddatz*, 447 U.S. 667, 676 n.3 (1980) (quoting *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947)).

ANILCA explicitly preserves pre-existing federal authority to regulate activities to protect the parks. Congress provided that—subject to specific exceptions—nothing in ANILCA "is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands." 16 U.S.C. § 3202(b). Congress also kept in place all pre-ANILCA federal authority to regulate activities on navigable waters. *Id.* § 3207("Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States . . ."). Congress did this to "clarif[y] that the Act does not affect the jurisdiction of the State of Alaska and the federal government as such jurisdiction relates to the appropriation, control, or development of water resources." S. REP. No. 96-413, at 175 (1979).

More specifically, ANILCA directs the Park Service and other federal agencies to regulate motorboating and other forms of transportation on rivers. *See* 16 U.S.C. § 3170(a). The requirement that federal agencies allow snowmachines, motorboats, and airplanes within CSUs for "traditional activities" and "for travel to and from villages and homesites"

demonstrates that Congress intended the agencies to have regulatory authority over navigable waters. *Ibid.*[5] Another provision of ANILCA, focused on protecting the use of motorboats and other surface transportation for subsistence purposes, likewise makes those uses "subject to reasonable regulation." *Id.* § 3121(b). In short, Congress, in ANILCA, specifically directed use of the federal agencies' authority to regulate activities like motorboating to "protect the natural and other values" of the CSUs. *Id.* § 3170(a).

Further, Congress established many of the CSUs specifically to protect rivers and the values associated with them, such as fish and wildlife, recreation, and subsistence uses. Congress emphasized, in both the statute and the legislative history, the importance to the parks of numerous rivers, and it never distinguished waters where the state owns the submerged land. Rather, Congress passed ANILCA, in part, to preserve "freeflowing rivers" and the ability to canoe and fish on those rivers. *Id.* § 3101(b).

To accomplish this, Congress established ten new Park Service units, twenty-six wild and scenic rivers, and other federal reservations in Alaska. Congress established all of the new parks to "protect these splendid lands and waters" and to provide unique

---

[5] Accordingly, the argument made by the Safari Club that float plane access will be barred by the Ninth Circuit's ruling is baseless. Br. of *Amicus Curiae* Safari Club International In Support of Pet'r 5, 12-15. In addition to 16 U.S. C. § 3170(a), ANILCA specifically requires the Park Service to allow "aircraft to continue to land at sites in the Upper Charley River watershed" within the Preserve except when such use "would be inconsistent with the purposes of the preserve." *Id.* § 410hh(10).

recreational opportunities, "ranging from the solitude and challenge of remote wilderness to . . . rafting down a crystal clear river." S. REP. No. 96-413, at 10. Four of the ten new national parks were established—and one of the three previously-existing parks expanded—to specifically protect identified rivers. Congress designated the Aniakchak River and other lakes and streams for protection "in their natural state" within the Aniakchak National Monument. 16 U.S.C. § 410hh(1). Congress specifically included the Kobuk, Salmon, and other rivers in the Kobuk Valley National Park to "maintain the environmental integrity" of the rivers "in an undeveloped state." *Id.* § 410hh(6); S. REP. No. 96-413, at 19 (indicating Congress included the Salmon River to preserve its wild character). Likewise, Congress tasked the Park Service with maintaining "the environmental integrity of the Noatak River" in the Noatak National Preserve, assuring that it is "unimpaired by adverse human activity," 16 U.S.C. § 410hh(8)(a), and the entire Charley River basin including streams, lakes, and other natural features, in its undeveloped natural condition in the Yukon-Charley Rivers National Preserve. *Id.* § 410hh(10). And Congress expressly expanded Glacier Bay National Monument and established Glacier Bay National Preserve to protect part of the Alsek River, *id.* § 410hh-1(1), which Congress found "has high potential for white water recreation and is a major international natural resource." S. REP. No. 96-413, at 35.

Two of the new national parks were established to protect rivers more generally. Congress established Gates of the Arctic National Park and Preserve and Lake Clark National Park and Preserve to protect the "scenic beauty" of the lakes and "wild rivers" in their

"natural state." 16 U.S.C. §§ 410hh(4), 410hh(7)(a); *see also* S. REP. No. 96-413, at 19 (including the John River in Gates of the Arctic National Park because it is "critical" to protect its "natural and wilderness character"). And nine of the new national parks were established—and three expanded—specifically to protect fish and wildlife. 16 U.S.C. §§ 410hh(1)–(4), (6)–(10), 410hh-1. Congress recognized the necessity of protecting "[p]ristine watersheds" for fish habitat. S. REP. No. 96-413, at 36 (including the headwaters of the Alagnak River and Nonvianuk Lake in the additions to the Katmai National Park and Preserve). The stated purposes of these reservations necessarily require that the Park Service have the authority to regulate activities on navigable waters within the parks.

Specific to the facts of petitioner's case, ANILCA's provisions and legislative history demonstrate congressional intent that the Park Service regulate navigable waters within the Yukon-Charley Rivers National Preserve (Preserve). The Park Service calculates that the Preserve protects 128 miles of the Yukon River and all 106 miles of the Charley River, plus the entire Charley River watershed. *See Yukon-Charley Rivers: What is Yukon Charley Rivers?*, NAT'L PARK SERV., http://www.nps.gov/yuch/what-is-yukon-charley-rivers.htm (last visited Aug. 14, 2018). Congress emphasized that the Yukon and Charley Rivers are "nationally significant," and it described the Charley as "what may be the best wild river in the state of Alaska" and "one of Alaska's best whitewater rivers." S. REP. No. 96-413, at 32–33 (noting that the Charley River is an outstanding resource that made designating the Preserve "clearly in the national interest" and that boating on the Charley River and its

tributaries "will provide high quality experiences for visitors").

Congress directed the Park Service to manage the navigable waters of the Preserve to, among other things, "protect habitat for, and populations of, fish and wildlife" and to "maintain the environmental integrity of the entire Charley River basin, including streams, lakes, and other natural features, in its undeveloped natural condition." 16 U.S.C. § 410hh(10); S. REP. No. 96-413, at 33 (anticipating federal control over rivers within the boundaries of the Preserve and noting that "the National Park Service is the appropriate management agency for the area").

The Yukon and Charley Rivers and their tributaries form the heart of the Preserve, with most park activities occurring on or alongside these rivers. *See Yukon-Charley Rivers: Plan Your Visit*, NAT'L PARK SERV., http://www.nps.gov/yuch/planyourvisit/index.htm (last visited Aug. 14, 2018); *see also* H.R. REP. No. 96-97, pt. 1, at 207 (1979) ("The Yukon River corridor [is where] . . . most of the visitor use of the preserve and wilderness is expected to occur. The Secretary should take into consideration the designation of a suitable landing location or locations within the Yukon-Charley for the purpose of public access to the river.").[6] The Nation River, where

---

[6] The logical consequences of petitioner's contentions would be to bar the Park Service from regulating navigation on the Yukon River within the Preserve. That result would be particularly strange, given the Yukon River's 2,400 mile length, and its historic role as an avenue of commerce extending more than 700 miles into Canada. *See Yukon River*, YUKON INFO, www.yukoninfo.com/yukon-river/ (last visited Aug. 14, 2018).

petitioner was approached by Park Service officials, lies partially within the Preserve, flowing from well beyond the Canadian border to the Yukon River.[7] *Sturgeon v. Masica*, 768 F.3d 1066, 1070 (9th Cir. 2014) ("The lower six miles of the Nation River lie within the Yukon-Charley Rivers National Preserve . . . ."). To access the Nation via the Yukon, one must travel through the Preserve. *See* Map at A1.

Congress' attention in ANILCA to protecting waterways extended beyond the national parks. Congress added twenty-six rivers to the National Wild and Scenic Rivers System, directing the Secretary of the Interior to administer them. 16 U.S.C. § 1274(a)(25)–(50). Thirteen of these designations are for rivers within National Parks, *id.* § 1274(a)(25)–(37), and six are for rivers within National Wildlife Refuges, *id.* §1274(a)(38)–(43). Under the Wild and Scenic Rivers Act, all of these rivers must be "administered . . . to protect and enhance the values which caused [them] to be included." *Id.* § 1281(a). Also, the Wild and Scenic Rivers Act specifically contemplates concurrent federal and state jurisdiction over the rivers, *id.* § 1281(e), but provides that state jurisdiction may not be exercised in a way that impairs the protection of the rivers, *id.* § 1284(d).

---

[7] The Nation River's origin in Canada is relevant because under the equal footing doctrine, as implemented by the Submerged Lands Act, a state may allocate and govern the bottoms of navigable rivers according to state law, but subject to the United States' power "to control such waters for purposes of navigation in interstate and foreign commerce." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012) (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)).

The Wild and Scenic Rivers Act explicitly gives federal agencies the authority to limit hunting otherwise allowed by the State "for reasons of public safety, administration, or public use and enjoyment." *Id.* § 1284(a). Under petitioner's reasoning, all of the Wild and Scenic Rivers where the State owns the submerged land would no longer be subject to these requirements. This would make ANILCA's addition of many—if not all—of the rivers to the National Wild and Scenic Rivers System meaningless by removing the Secretary of the Interior's ability to protect them as mandated by Congress. This would result in the "paralyzing hand" this Court cautioned against in *Raddatz*, 447 U.S. at 676 n.3. And if § 103(c) is held to have repealed federal authority to regulate navigable waters overlying state-owned submerged land within CSUs, it would have the incongruous result that navigable rivers flowing through federal lands in Alaska outside CSUs where petitioner's strained reading of § 103(c) would not apply—such as in the Chugach National Forest and the unreserved land managed by the Bureau of Land Management—would be subject to federal regulation while rivers designated under the Wild and Scenic Rivers Act would not.

Notwithstanding the centuries-old federal constitutional power to regulate navigable waters, and the explicit statutory language preserving that authority, 43 U.S.C. § 1311(d), 54 U.S.C. § 100751(b), 16 U.S.C. §§ 3170(a), 3207, petitioner contends that § 103(c) took away that power by implication. Section 103(c) never discusses the federal power to regulate navigable waters. Congress would not have directed the Park Service to protect specific rivers or directed the Park Service to regulate activities on navigable

waters, while at the same time, and in the same statute, taking away all Park Service regulatory authority over those waters.

Petitioner claims section 103(c) of ANILCA and Alaska's "superior" claim of title to the water in navigable rivers means that those waters are not public lands, and the Park Service may not regulate them pursuant to its general authority to manage national parks. Petr. Br. at 26–28.[8] But the federal power to regulate navigable waters does not depend on who owns the bottom of a river or lake.[9] As this Court long ago stated, *Rands*, 389 U.S. at 127, the transfer of submerged lands to states, "left congressional power

---

[8] Amici join in the government's alternative argument that regulation of navigable rivers within National Park System units is also provided for through the federal reserved water rights the federal government retained when the park units were withdrawn for conservation purposes. Respondent's Br. at 32–37.

[9] To the extent that any property interest is required, the Government is correct, Respondent's Br. 32–37, that the United States owns federal reserved water rights (FRWRs) in some navigable waters in Alaska—both inside and outside of CSUs. *John v. United States*, 720 F.3d 1214, 1221–22 (9th Cir. 2013), *cert. denied* 134 S. Ct. 1759 (2014). This property interest arises both in the area of federal subsistence management, *ibid*, and regarding federal lands reserved for conservation purposes. *Cappaert*, 426 U.S. at 138. Were it relevant or necessary to the disposition of this case—and it is not—this fact would require the conclusion, as the Secretaries of the Interior and Agriculture have determined, that all navigable and non-navigable waters within 34 CSUs, including Yukon-Charley Rivers National Preserve, are federal "public lands" within the meaning of ANILCA, because the FRWRs are property "interests" in the "waters." 16 U.S.C. § 3102(1)–(3) (defining "public lands" as "lands, waters, and interests therein," "the title to which is in the United States.").

over commerce and the dominant navigational servitude of the United States precisely where it found them." Under the SLA, Alaska received neither ownership of the navigable waters, *see United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913), nor the right to exclusively regulate them. *United States v. California*, 436 U.S. 32, 41 n.18 (1978). *Amici* are not aware of a single reported decision in which the federal government's Property Clause and Commerce Clause management authority over navigable waters was held to be subordinated to, or displaced by, state ownership of the submerged land. Such a result would upend the Constitution and more than 200 years of constitutional history.

ANILCA must be read "to give the Act the most harmonious, comprehensive meaning possible." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631–32 (1973) (quoting *Clark*, 332 U.S. at 488). Here, that reading is that ANILCA preserves federal authority over navigable waters within CSUs, allowing application of the Park Service's prohibition of hovercraft within the parks.

## III. The National Park Service Must Have The Power to Regulate The Navigable Waters To Achieve The Purposes For Which Congress Established The Parks

Recognizing that the rivers are essential to the lands it manages and to achieving Congress' objectives for preserving those lands, the Park Service regulates activities on navigable waters overlying state-owned submerged land within the parks according to the purposes for which they were established. Examples include prohibiting hovercraft and managing visitation for particularly popular rivers to maintain

the rivers' and the parks' character. The Park Service also relies on its own travel on the navigable rivers to enforce its regulations that apply park-wide.

The Park Service's prohibition of hovercraft within the parks is a necessary regulation of navigation to protect park resources and the visitor experience. In 1983, the Park Service adopted regulations that prohibit hovercraft to protect the Park System. 36 C.F.R. § 2.17(e). Personal hovercraft are generally 10–20 feet long, but can be significantly larger; some hovercraft can carry 100 people. Hovercraft are noisy, and most models are louder than the maximum noise level allowed by Park Service regulations for vessels. *See* 36 C.F.R. § 3.15(a) (vessels must operate below 75 dB(a)); *Hovercraft Environment*, HOVERCRAFT.ORG, www. hovercraft.org/hovercraft-environment/ (last visited Aug. 19, 2018) ("modern hovercraft typically reach levels of up to 80 decibels"). The Park Service prohibited hovercraft "because they provide virtually unlimited access to park areas and introduce a mechanical mode of transportation into locations where the intrusion of motorized equipment by sight or sound is generally inappropriate." General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30252, 30258. Because hovercraft travel on a cushion of air, they are not limited to waterways, as are traditional boats. *Ibid.* Rather, they can move over mudflats, wetlands, gravel bars, and mild rapids, accessing areas not generally considered navigable by motorized boats. And that is why petitioner desires to use his hovercraft within the Preserve: to reach areas that are inaccessible by other watercraft. Pet'r's Opening Br. at 13; Robin Bravender, *National Parks: Moose Hunter's Unlikely Path to the Supreme Court*, GREENWIRE, Nov. 23, 2015,

www.eenews.net/stories /1060028460/ (last visited Aug. 14, 2018) (the hovercraft "allowed [Sturgeon] to travel over gravel bars and shallow areas. . . . [In a jet boat, Sturgeon] can't get up the river as far as [he] normally do[es] [in the hovercraft], and some years [he] can't get up it at all.").

The Park Service also regulates specific rivers to reduce resource impacts and protect the parks. For example, the Park Service imposes strict guidelines to reduce resource impacts and retain a wilderness experience on the Alsek River in Glacier Bay National Park. *See* 36 C.F.R. § 13.1108. The Alsek is a popular and nationally-known river for week-long or longer rafting trips in remote wilderness. Park Service permits are required to float the Alsek. *Id.* § 13.1108(a). Only one trip is allowed to start each day, and the waiting list for a private permit is several years long. The Park Service limits group size and the length of time visitors can stay at popular camp spots, and requires visitors to carry out all trash, including human waste. 36 C.F.R. § 13.1108(b)–(e). These regulations are in place to protect the park, the river, and the visitor experience.

Revoking the Park Service's authority over navigable waters would cripple the Park Service's enforcement abilities. In many parks in Alaska, the navigable rivers form the major transportation corridors, akin to roads in the parks in the contiguous United States. For example, the Yukon River in the Preserve is how the majority of visitors travel through the Preserve. *Yukon-Charley Rivers: Plan Your Visit*, NAT'L PARK SERV., http://www.nps.gov/yuch/planyourvisit/indcx.htm (last visited Aug. 14, 2018). Similarly, the Park Service uses the Yukon River to travel within the Preserve to enforce Park Service

regulations, both on and off the river. *See, e.g.*, NAT'L PARK SERV., Winter Patrols in Yukon-Charley Rivers, http://www.nps.gov/yuch/learn/news/upload/YUCHWinterPatrols2-fixed.pdf (last visited Aug. 19, 2018) (indicating that winter patrols are centered around the Yukon River).

Other park resources and visitor experiences would be significantly impaired if the Park Service were barred from enforcing its regulations on navigable waters. The Park Service may be unable to implement seasonal closures to ensure passage of king salmon into Canada to fulfill international treaty obligations, *see* 16 U.S.C. §§ 5701–5727, to prevent the dumping of trash or fuel into the waterway, or to enforce subsistence hunting and fishing regulations when violations occur on the water. In short, without having the ability to enforce regulations on navigable waters, the Park Service could be significantly constrained in protecting parks, especially in those parks where the majority of public use occurs on those waters.

* * *

*Amici* urge the Court to affirm the Court of Appeals' decision. The power of the Park Service to regulate navigable waters in parks is constitutionally based, and has been delegated and preserved by numerous statutes, including ANILCA. Reading § 103(c) of ANILCA to impliedly repeal this authority would have far-reaching consequences, significantly reducing the federal agencies' ability to protect CSUs for the purposes for which Congress set them aside. ANILCA is properly read to keep in place the Park Service's authority over navigable waters. The remainder of issues implicated by petitioner's question presented, regarding the reach of § 103(c)'s limitations

on the regulation of State, Native Corporation, and private inholdings, are not at issue.

## CONCLUSION

For the foregoing reasons, and those set forth by the government, the decision of the court of appeals should be affirmed.

Respectfully submitted,

Thomas E. Meacham
Attorney at Law
9500 Prospect Drive
Anchorage, AK 95507

Donald B. Ayer
Jones Day
51 Louisiana Ave., NW
Washington, D.C.
20001

Valerie Brown
*Counsel of Record*
Katherine Strong
Trustees for Alaska
1026 W. 4th Ave., Suite 201
Anchorage, AK 99501
(907) 276-4244
vbrown@trustees.org

September 18, 2018

# APPENDIX

A1